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BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE FORMAL
COMPLAINT OF CHARLES J. DAINS
AGAINST RIGBY WATER COMPANY

DOCKET NO. W-01808A-09-0137

**RIGBY WATER COMPANY'S
POST-HEARING MEMORANDUM**

Pursuant to the Procedural Order dated November 16, 2010, Rigby Water Company ("Rigby") respectfully submits its post-hearing memorandum in this matter. This memorandum addresses (1) the application of A.A.C. R14-2-406 (F) and (M) to the circumstances revealed by the evidence at the hearing of this matter, (2) Rigby's compliance with the Arizona Corporation Commission's regulations, (3) the impact of Complainant's malfeasance on Rigby's compliance efforts, and (4) the Arizona Corporation Commission's jurisdiction with respect to the main extension agreements of a public service corporation being condemned by a municipality.

Under the facts and circumstances presented at the hearing, Rigby has complied with the rules of the Arizona Corporation Commission ("Commission"). Alternatively, the Commission should find that any purported, technical non-compliance by Rigby is excused as a matter of law, because the Complainant actively precluded compliance with the Commission's regulations, despite being fully informed of those regulations. Because Complainant cannot use its own misdeeds to frustrate Rigby's ability to comply with Commission regulations and then attempt to twist that situation to Complainant's own

1 financial benefit, the Commission should enter an order finding that Rigby has complied
2 with Commission Rule R14-2-406 and denying the relief sought by Complainant.

3 **I. FACTUAL AND PROCEDURAL BACKGROUND.**

4 Rigby has provided public water service in the Avondale area for approximately 30
5 years. The Complainant, Mr. Charles J. Dains ("Mr. Dains"), was the developer of the
6 Terra Ranchettes Estates ("Terra Ranchettes") located in Rigby's Certificate of Convenience
7 and Necessity ("CC&N") in Avondale, Arizona. [See Pre-Filed Direct Testimony of F.
8 Wilkinson at 4:13-16; Pre-Filed Direct Testimony of Charles D. Dains ("C. D. Dains" or
9 "Mr. Dains Jr." in non-citation) at 1:12-19; Ex. CCD-1 (map).]¹ Mr. Dains (along with
10 others) purchased the land for the Terra Ranchettes development in or about 1985. [Pre-
11 Filed Direct Testimony of C. D. Dains at 2:1-5; Trans. 34:15-20.] While Mr. Dains' estate
12 now alleges that Terra Ranchettes was not developed until the mid-1990s due to Rigby's
13 non-compliance with certain regulations, the evidence at the hearing demonstrated that Mr.
14 Dains never actually requested service at that time. [Trans. 36:8-22 (Mr. Dains made
15 informal inquiries of Rigby, but no formal request).] Mr. Dains' estate now claims that no
16 request was made because Rigby was not in compliance with all applicable regulatory
17 requirements. However, the evidence actually reveals that Rigby's compliance status was
18 irrelevant to development. [See Ex. RWC 16 (March 19, 1985 letter from Rigby copied to
19 Mr. Dains indicating that Rigby was prepared to provide water service to the proposed
20 subdivision); see also Pre-Filed Direct Testimony of F. Wilkinson at 6:8-13 (Mr. Dains able
21 to complete development while Rigby addressed storage compliance issues); Trans. 135:7-
22 136:3 (Rigby was in compliance in early 1990s).] Mr. Dains simply chose not to develop
23

24 ¹ The pre-filed direct testimony of witnesses is referred to as "Pre-Filed Direct
25 Testimony of ____," with following references to the page and line numbers of that pre-filed
26 testimony. Testimony taken at the hearing shall be referred to as "Trans.," with following
27 references to the page and line numbers of the referenced transcript. Hearing Exhibits shall
28 be referred to as "Ex. ____." Rigby's pre-filed exhibits, RWC 1 through RWC 14 were
admitted as part of hearing exhibit R-1, and are referred to by their RWC designation for
clarity.

1 the subdivision, and subsequently chose not to do anything with the parcel for
2 approximately ten years, including numerous years when Rigby was fully compliant.²
3 [Trans. 135:7-136:3, 71:3-11 (Mr. Dains chose not to sell or do anything with property),
4 72:5-9 (same).]

5 **A. The Development of Terra Ranchettes.**

6 In or about 1995, Mr. Dains again approached Rigby about providing water service
7 to the Terra Ranchettes subdivision. [Pre-Filed Testimony of F. Wilkinson at 4:13-14.] As
8 Mr. Wilkinson, the president of Rigby and individual that directly interacted with Mr. Dains
9 with respect to Terra Ranchettes' development, explained, Rigby agreed to provide water
10 service to Terra Ranchettes, [Pre-Filed Direct Testimony of F. Wilkinson at 4:5-6 (Mr.
11 Wilkinson was principal contact with Mr. Dains); see also Ex. RWC 1 (January 25, 1996
12 letter from F. Wilkinson to C. Dains indicating Rigby would provide service to Terra
13 Ranchettes)], but also informed Mr. Dains that he would need to comply with Commission
14 regulations by entering into a mainline extension agreement with Rigby. [Pre-Filed Direct
15 Testimony of F. Wilkinson at 4:13-20; Exs. RWC 1 (explaining that Rigby was a public
16 service corporation subject to Commission oversight, and that those regulations required the
17 parties to enter into a mainline extension agreement), RWC 2 (letter dated March 19, 1996
18 from F. Wilkinson to C. Dains enclosing executed water service agreements for subdivision
19 and requesting Mr. Dains review applicable Commission regulations).] In fact,
20 Mr. Wilkinson supplied Mr. Dains with a copy of those regulations. [Ex. RWC 1 (January
21 26, 1996 letter to Mr. Dains enclosing Commission regulations).]

22 Under those regulations, Rigby was required to enter into a mainline extension
23 agreement with Mr. Dains. [Id.] Such an agreement had to meet the minimum requirements
24 contained in A.A.C. R14-2-406. [Id.; see also Ex. S-2 (staff checklist of requirements for
25 _____

26 ² Notably, Mr. Dains Jr. was not a party to any correspondence, conversations or
27 meetings with Rigby. [Trans. 30:1-31:15; Pre-Filed Direct Testimony of F. Wilkinson at
28 4:7-12.] His testimony with respect to such interactions must, therefore, be accorded little
weight in this matter.

1 approval of mainline extension agreement).] Mr. Wilkinson informed Mr. Dains that the
2 developer would need to install the infrastructure necessary to supply water to Terra
3 Ranchettes. [Ex. RWC 1 ("The Agreement requires the applicant [Mr. Dains] to cause the
4 water system to be constructed and the utility to refund the cost of the system to the
5 applicant under certain terms and conditions"); Trans. 171:17-172:15 (Mr. Wilkinson
6 provided Mr. Dains with a blank mainline extension agreement within weeks of being
7 notified that construction had started).] In exchange, Rigby would refund an amount equal
8 to ten percent of the amount of future water sales to the subdivision to Mr. Dains for at least
9 ten years. [Ex. RWC 5 (mainline extension agreement), ¶ 16).]

10 Despite the numerous follow up discussions outlined by Mr. Wilkinson at the
11 hearing, Mr. Dains did not respond to Rigby's requests to enter into a mainline extension
12 agreement. [Pre-Filed Direct Testimony of F. Wilkinson at 6:15-24; Trans. 170:14-174:23
13 (detailing Mr. Wilkinson's interactions with Mr. Dains related to outstanding issues).] Nor
14 did Mr. Dains provide any funds to Rigby as an advance in aid of construction. [Pre-Filed
15 Testimony of F. Wilkinson at 16:4-6; Trans. 172:22-25.] Instead, in or about March 1996,
16 Mr. Dains proceeded with the unilateral development of Terra Ranchettes, including
17 installation of the water infrastructure. [Pre-Filed Testimony of F. Wilkinson at 4:21-27;
18 Trans. 171:17-172:11 (Rigby's first notice of construction came through its field personnel's
19 observation).] As conclusively demonstrated at the hearing, the infrastructure installed by
20 Mr. Dains was necessary to meet the projected water demands of the Terra Ranchettes
21 subdivision, not to benefit Rigby. [Pre-Filed Direct Testimony of F. Wilkinson at 5:1-6,
22 5:15-17 ("[t]he storage installed by Mr. Dains was necessary for the addition of the Terra
23 Ranchettes subdivision); Trans. 132:22-133:19, 174:24-175:10 (Rigby did not use storage
24 installed for Terra Ranchettes to comply with county requirements); Exs. RWC 8 (Samer &
25 Assoc. report indicating that Terra Ranchettes addition necessitated additional storage
26 capacity); RWC 15 (similar).] Mr. Dains completed construction of Terra Ranchettes in or
27 about June 1997. [Pre-Filed Direct Testimony of F. Wilkinson at 4:21-25; Pre-Filed Direct
28 Testimony of C. D. Dains at 3:14-17.]

1 **B. Rigby's Efforts to Comply With Commission Regulations.**

2 After construction was complete, Mr. Dains began selling lots to the public, [ex.
3 RWC 7 (Application for Water Service dated July 14, 1997 for Mr. Dains' family
4 residence)], and requested that Rigby begin providing water service to those lots.³ [Pre-
5 Filed Direct Testimony of F. Wilkinson at 7:1-5; Ex. RWC 7.] Because consumers were
6 requesting service, Rigby began providing service to the subdivision despite Mr. Dains'
7 refusal to enter into a mainline extension agreement. [Pre-Filed Direct Testimony of F.
8 Wilkinson at 6:15-7:5; Trans. 179:14-180:6.] Rigby had no ability to force Mr. Dains to
9 enter into a mainline extension agreement. [See, e.g., Pre-Filed Direct Testimony of F.
10 Wilkinson at 6:15-24 (Mr. Wilkinson had to "hound Mr. Dains for nearly four years to get
11 the mainline extension agreement signed"); Exs. RWC 1 (informing Mr. Dains of
12 requirement in 1996), RWC 3 (letter dated July 21, 1998 from F. Wilkinson to C. Dains
13 requesting that Mr. Dains enter into a mainline extension agreement), RWC 4 (letter dated
14 February 19, 1999 from F. Wilkinson to C. Dains requesting execution of mainline
15 extension agreement).] As Mr. Wilkinson noted in his testimony at the hearing, in
16 hindsight, Rigby probably should have refused to begin providing service to Terra
17 Ranchettes until the mainline extension agreement was executed and approved by the
18 Commission. [Trans. 179:14-180:6 ("Well, knowing what we know now, we probably
19 should have just not turned the valve on, but we were working closely with Mr. Dains").]
20 However, Rigby (and its parent company) had never before encountered a developer that
21 refused to execute a mainline extension agreement or provide the information necessary for
22 Commission review and approval. [Pre-Filed Direct Testimony of F. Wilkinson at 16:21-
23 17:5; Trans. 103:13-104:11, 167:3-16.] Accordingly, Rigby assumed operation of the Terra

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25 ³ As Mr. Dains Jr. admitted at the hearing, Mr. Dains accounted for the cost of the
26 water infrastructure in the cost of the lots themselves. [See Trans. 31:25-34:10 (Mr. Dains
27 Jr. admitting that sale of lots in development recouped, at a minimum, \$1.6 million); Trans.
28 60:19-61:15 (lot prices were set before parties entered into Agreement and Mr. Dains
anticipated making profit on lots).] Mr. Dains' estate now seeks to double recover those
costs. As discussed below, that effort should be rejected.

1 Ranchettes system without an executed mainline extension agreement in place. [Trans.
2 179:14-180:6.]

3 In March 1999, nearly two years following completion of construction, and after the
4 repeated follow up testified to by Mr. Wilkinson, Mr. Dains finally negotiated and signed a
5 form of Rigby's standard main line extension agreement (the "Agreement").⁴ [Ex. RWC 5.]
6 Under the terms of the Agreement, Mr. Dains was to be refunded ten percent of the amounts
7 received by Rigby from the provision of water to Terra Ranchettes for a period of twenty
8 years. [Id., ¶ 16] Contrary to Mr. Dains' allegations, the parties did not treat this
9 transaction as a sale. [Pre-Filed Direct Testimony of F. Wilkinson at 15:23-16:19; Trans.
10 180:7-18.] The Agreement provided, consistent with Commission rules, that any amounts
11 not refunded during that time would become an unrecoverable contribution in aid of
12 construction. [Ex. RWC 5, ¶ 16.] Mr. Dains was fully aware of these provisions, as he had
13 first been informed of their applicability in 1985 and subsequently provided the regulations
14 in 1996, just three years earlier. [Exs. RWC 16 (letter dated March 19, 1985 from T.
15 Macherione, with a copy to C. Dains, stating that "[w]ater service by Rigby Water Company
16 is expressly conditioned upon the developers financing the cost of the project, conveyance
17 of land titles and easements, and obtaining all necessary governmental approvals, including
18 those required of, but not limited to, ... the Arizona Corporation Commission"), RWC 1
19 (January 26, 1995 letter from F. Wilkinson to C. Dains enclosing the regulations applicable
20 to mainline extension agreements; "Agreement requires the applicant to cause the water
21 system to be constructed and the utility to refund the cost of the system ... under certain
22 terms and conditions").] Contrary to Mr. Dains' allegations, there was no evidence
23 presented at the hearing that the contemplated mainline extension agreement was anything
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26 ⁴ As Mr. Wilkinson testified, Rigby's standard form of mainline extension
27 agreement has been filed with and approved by the Commission on several other occasions
28 without issue. [Pre-Filed Direct Testimony of F. Wilkinson at 14:9-15; Trans. 147:20-
148:12 (agreement has been approved seven other times); 169:3-14 (same).]

1 other than what it purports to be – a Commission compliant agreement intended to facilitate
2 the orderly development of necessary water infrastructure.⁵

3 Mr. Dains, who had designed and constructed the system, was obligated to obtain and
4 provide the Approval to Construct (“ATC”) required pursuant to A.A.C. R14-2-406(M) for
5 approval by the Commission. [Pre-Filed Direct Testimony of F. Wilkinson at 13:22-14:7,
6 16:21-17:5 (Mr. Wilkinson informed Mr. Dains of requirement to provide ATC on multiple
7 occasions); see also Ex. RWC 5, ¶ 6 (requiring Mr. Dains to construct water infrastructure
8 in compliance with all applicable governmental regulations and to obtain “all applicable
9 permits ... which may be required prior to construction ...”).] Although there was no
10 evidence on this point adduced at the hearing, Mr. Dains apparently obtained an ATC for
11 the subdivision from the Maricopa County Department of Health in 1983. [See Ex. Dains
12 12 (late filed copy of 1983 ATC).] As Mr. Wilkinson testified, however, that ATC was
13 never provided to Rigby, despite repeated requests. [Pre-Filed Direct Testimony of F.
14 Wilkinson at 13:22-14:2; see also Trans. 55:25-56:11 (Mr. Dains Jr. admitting that he has no
15 documentation indicating the ATC was ever provided to Rigby).]

16 Similarly, Mr. Dains never substantiated the costs of construction, as required by
17 Commission regulations. [Pre-Filed Direct Testimony of F. Wilkinson at 13:22-27, 17:7-27;
18 Trans. 49:16-51:5, 58:12-15 (Mr. Dains Jr. admitting that he doesn’t know cost information
19 was supplied to Rigby), 75:16-23 (Mr. Dains Jr. did not even attempt to obtain copies of
20 invoices for hearing); Ex. Dains-4 (April 4, 1997 letter from F. Wilkinson to Mr. Dains
21 requesting as-built drawings, construction invoices and testing results).] Instead, Mr. Dains
22

23 ⁵ Mr. Dains has cited Rigby’s provision of a mistaken pre-execution estimate of
24 water usage and refund amounts to argue that Mr. Dains “sold” the Terra Ranchettes’ water
25 infrastructure to Rigby. [See Trans. 13:20-22 (counsel’s opening statement).] As the
26 evidence at the hearing demonstrated, however, Rigby provided Mr. Dains with the
27 underlying data for that estimate. [Pre-Filed Direct Testimony of F. Wilkinson at 7:22-8:3;
28 Ex. RWC 6 (actual estimate data supplied to Mr. Dains); Trans. 60:16-18 (Mr. Dains Jr.
admitting receipt).] As a result, Mr. Dains was fully aware that he would likely not recover
the costs of construction through the Agreement, and that he was not “selling” the
infrastructure to Rigby.

1 provided at least three conflicting cost estimates. [See Exs. RWC 5 (\$236,988.68), 13
2 (\$207,388.67) and 14 (\$204,414.34).] As a result of Mr. Dains' failure to meet his
3 obligations under the Agreement, Rigby was unable to obtain Commission approval of the
4 Agreement at that time. [Pre-Filed Direct Testimony of F. Wilkinson at 14:4-7; see Trans.
5 166:5-15.] Nonetheless, Rigby abided by its obligations under the Agreement and began
6 making annual refund payments to Mr. Dains in 2000. [Pre-filed Testimony of F.
7 Wilkinson at 9:13-13:2; Exs. RWC 9, 10.] Rigby has continued to make those annual
8 refund payments, and Mr. Dains (and his estate) have accepted those payments every year
9 since. [Pre-filed Testimony of F. Wilkinson at 9:13-13:2; Exs. RWC 9, RWC 10; Trans.
10 166:16-20 (despite not receiving Commission approval of Agreement, Rigby made annual
11 refund payments required by Agreement).]

12 **C. Mr. Dains' Bad Faith Attempts to Profit From His Own Misdeeds.**

13 Nine years after Rigby first began providing service to Terra Ranchettes, the City of
14 Avondale (the "City") began publicly discussing the possible acquisition of Rigby. [Pre-
15 Filed Direct Testimony of F. Wilkinson at 12:14-19; Trans. 64:4-65:11; Ex. R-2 (August 15,
16 2006 letter from Mr. Dains Jr. to Rigby discussing potential acquisition of Rigby by City).]
17 In October 2006, Mr. Dains lodged an informal complaint with the Commission raising the
18 same issues raised in this proceeding. [Informal Complaint materials docketed by Staff in
19 this proceeding (6/2/2009).] In that informal complaint (and earlier demand letters), Mr.
20 Dains sought, in essence, to rescind the Agreement and force Rigby to pay Mr. Dains the
21 entire cost of constructing the water infrastructure for Terra Ranchettes, despite Rigby never
22 receiving any funds from Mr. Dains. [Ex. R-2 (letter from Mr. Dains Jr. demanding a
23 meeting to "discuss renegotiation of the Agreement ...").] The informal complaint that was
24 filed with the Commission included a copy of the Agreement. [See Informal Complaint
25 materials docketed by Staff in this proceeding (6/2/2009) (referring to packet of materials
26 accompanying informal complaint).] Rigby responded to the informal complaint by
27 providing an accounting of payments made to Mr. Dains to the Commission. [Pre-Filed
28 Direct Testimony of F. Wilkinson at 12:21-25; RWC 9 (account statements provided to

Commission).] The Commission took no action on Mr. Dains' informal complaint, and took no action with respect to approval of the Agreement. [Pre-Filed Direct Testimony of F. Wilkinson at 12:21-25; Trans. 189:9-20 (informal complaint was closed without Commission action).]

In January of 2009, the City filed a condemnation action against Rigby in Maricopa County Superior Court. [See Maricopa County Superior Court Case No. CV2009-003060.] Following that filing, and nearly three years after the initial informal complaint, Mr. Dains filed the present formal Complaint with the Commission seeking immediate repayment of all amounts spent installing the water infrastructure for Terra Ranchettes, plus interest.⁶ [Formal Complaint (3/19/2009).] In response to the formal Complaint, Rigby re-filed the Agreement with the Commission. [See Docketed Notice of Filing (5/18/2009).] The Commission has still taken no action with respect to that filing, despite admitting at the hearing that Commission Staff had reviewed the Agreement and found nothing objectionable in it. [Trans. 191:20-192:5 (other than the lack of the ATC, no reason Agreement should not be approved), 196:1-7 (similar); see also Pre-Filed Direct Testimony of F. Wilkinson at 13:18-14:26.]

II. LEGAL ANALYSIS.

Mr. Dains' Complaint must be rejected because, as the evidenced adduced at the hearing demonstrates: (1) Rigby has complied with Commission rules, (2) Mr. Dains' own misconduct is the actual cause of the issues alleged in the Complaint, (3) Mr. Dains' Complaint is outside any possibly relevant statute of limitations, and (4) Mr. Dains' remaining claims, such as his unjust enrichment claim, are outside the jurisdiction of the Commission. In addition, the question of the Commission's jurisdiction pursuant to A.A.C.

⁶ At the hearing, Mr. Dains' purported expert testimony and calculations supporting this request were stricken. [Trans. 7:24-8:8 (ruling striking testimony).] Mr. Dains presented no additional evidence supporting the actual amounts spent constructing the infrastructure at issue. [Trans. 75:16-23 (admitting that Complainant had not even attempted to obtain copies of invoices substantiating costs).]

1 R14-2-406(F) is more properly considered in docket W-01808A-10-0390, Rigby's pending
2 request for cancellation of its Certificate of Convenience and Necessity, a docket that Mr.
3 Dains has intervened in.

4 **A. As Demonstrated at the Hearing, Rigby Is Fully Compliant With**
5 **Commission Rules.**

6 Commission Rule R14-2-406(M) provides:

7 All agreements under this rule shall be filed with and approved
8 by the Utilities Division of the Commission. No agreement shall
9 be approved unless accompanied by a Certificate of Approval to
10 Construct as issued by the Arizona Department of Health
11 Services. Where agreements for main extensions are not filed
12 and approved by the Utilities Division, the refundable advance
shall be immediately due and payable to the person making the
advance.

13 The rule does not set a time limit for the filing and approval of a mainline extension
14 agreement by the Commission. [See Trans. 190:12-15 (Mr. Morton agreeing there is no
15 time frame for submission of mainline extension agreement).] The rule thus recognizes that
16 various circumstances outside a public service company's control affect the timing of filing
a mainline extension agreement and associated information required by the Commission.

17 Here, as detailed above, Mr. Dains' actions prevented the immediate filing and
18 approval of the Agreement. Specifically, Mr. Dains (1) failed to timely execute the required
19 mainline extension agreement, (2) failed to provide the required ATC to Rigby or the
20 Commission, and (3) failed to substantiate the costs of the system as required by the
21 Commission, while accepting the proceeds from the Agreement for nearly ten years before
22 finally filing the present Complaint. There was no evidence presented at the hearing that
23 Rigby failed to provide the Commission with all of the information at its disposal with
24 respect to the Agreement.

25 Since the date of the hearing, Mr. Dains' estate has finally located and filed, as a late-
26 filed exhibit, a copy of the original approval to construct, [ex. Dains 12], along with a
27 memorandum from the Arizona Department of Environmental Quality dated May 2, 1996
28 indicating that the original approval to construct was still valid. [Dains 13.] The Agreement

1 has now been filed on at least two occasions with the Commission. To the extent these late
2 filed materials satisfy Commission requirements, [see Ex. S-2 (Staff checklist)], Rigby is
3 fully in compliance with R14-2-406(M) and is awaiting only Commission approval of the
4 Agreement. Accordingly, an order recognizing that Rigby has complied with A.A.C. R 14-
5 2-406(M) should be entered.

6 **B. Mr. Dains' Own Actions Preclude Relief on the Complaint.**

7 Arizona law has long recognized that "[a] party to a contract cannot prevent the
8 fulfillment of a condition precedent [or subsequent] and later rely on the failure of the
9 condition to argue that no contract exists." Johnson Int'l, Inc. v. City of Phoenix, 192 Ariz.
10 466, 471, 967 P.2d 607, 612 (App. 1998); see also Security Nat'l Life Ins. Co. v. Pre-Need
11 Camelback Plan, Inc., 19 Ariz. App. 580, 582, 509 P.2d 652, 654 (1973) ("if one prevents
12 fulfillment of a condition precedent one cannot thereafter rely on such failure of the
13 condition to defeat the agreement"); Williams v. Nall, 4 Ariz. App. 416, 420, 420 P.2d 988,
14 992 (1966) ("one who prevents performance of a contract may not complain of such
15 nonperformance"); Siegal v. Haver, 4 Ariz. App. 119, 122, 417 P.2d 928, 931 (1966) ("One
16 waives the performance of a condition and cannot rely on it to prevent recovery where its
17 non-performance is caused or consented to by him"); Holmes v. Graves, 83 Ariz. 174, 177-
18 178, 318 P.2d 354, 356-57(1957) ("[s]tatutory provisions enacted for the benefit of
19 individuals may be so far waived by those for whose benefit they were enacted that they are
20 estopped to insist upon their protection"); Rossi v. Hammons, 34 Ariz. 95, 101, 268 P. 181,
21 183 (1928) ("one who invites error is thereafter estopped from complaining of it").

22 The Restatement (Second) of Contracts, consistent with Arizona law, makes clear
23 that in circumstances where a party's performance is rendered impracticable or where it is
24 frustrated by another party, the conditions of performance are discharged. See Restatement
25 (Second) of Contracts §§ 261, 265 (1981). Thus, Arizona law provides that a condition
26 subsequent, such as Rigby's obligation to obtain approval of the Agreement, is discharged
27 under the circumstances presented. Id., §261 ("Where, after a contract is made, a party's
28 performance is made impracticable without his fault by the occurrence of an event the non-

1 occurrence of which was a basic assumption on which the contract was made, his duty to
2 render that performance is discharged, unless the language or the circumstances indicate the
3 contrary"); see also 17A Am. Jur. 2d Contracts § 666 (2004) ("Impossibility that arises
4 directly or even indirectly from the acts of the promisee [here, Mr. Dains] is considered a
5 sufficient excuse for the other party not performing, since one who prevents performance
6 may not take advantage of the situation").

7 Mr. Dains (and his estate) cannot be permitted to profit from an alleged failure to
8 comply with Commission regulations, where Mr. Dains actually frustrated Rigby's
9 compliance with those requirements. When Mr. Dains requested service from Rigby in
10 1995 (and later entered into the Agreement), Mr. Dains assumed a duty of good faith and
11 fair dealing to Rigby. Thus, Mr. Dains was obligated, at a minimum, to not frustrate
12 Rigby's filing of the Agreement (and subsequent Commission approval), essential
13 conditions subsequent to the Agreement. See Taylor v. State Farm Mut. Auto. Ins. Co.,
14 185 Ariz. 174, 176, 913 P.2d 1092, 1094 (1996) ("The duty of good faith requires that
15 neither party act in a manner that would damage the rights of the other party to receive the
16 benefits flowing from the underlying contractual relationship").

17 Accordingly, Mr. Dains could not, in good faith, frustrate and render impossible
18 Rigby's efforts to obtain Commission approval. Rather than honor this obligation, however,
19 Mr. Dains refused to supply the information necessary for Rigby to comply with
20 Commission requirements, as set forth in detail above and throughout the record of the
21 hearing. Compounding his bad faith, once Mr. Dains realized that his prior actions had
22 prevented Rigby from obtaining Commission approval of the Agreement, Mr. Dains sought
23 to take advantage of his own malfeasance by seeking an immediate refund of all amounts
24 stated in the Agreement.⁷

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26
27 ⁷ Mr. Dains' actions distinguish this case from Decision 66593, cited by Mr. Morton
28 in his pre-filed testimony. As Mr. Morton admitted under questioning, in the Park Valley
Water Company case, the complainant had not taken any action thwarting compliance with
the Commission's regulations. [Trans. 192:6-113:12 (discussing material differences

1 Requiring Rigby to immediately pay Mr. Dains an amount equal to the funds he
2 allegedly expended in installing the Terra Ranchettes infrastructure, after Mr. Dains
3 frustrated compliance, would be grossly inequitable and inconsistent with the public interest
4 in solvent, stable public service corporations and orderly development and the intent of the
5 Commission regulations. It would also encourage and reward bad faith behavior by the
6 development community. Rigby's compliance with R14-2-406(M), including filing a copy
7 of the ATC and substantiation of development costs, was necessarily conditioned upon Mr.
8 Dains' good faith cooperation. Rigby obviously could not obtain approval of the Agreement
9 because Mr. Dains refused to cooperate. Mr. Dains should not be allowed to manufacture a
10 technical violation of Commission regulations for his own benefit, especially where Mr.
11 Dains has accepted the benefits of the Agreement for ten years and only raised an issue
12 when he found out that Rigby might be acquired by the City. Mr. Dains' (and his estate's)
13 behavior in this matter justify an order that the requirements of R14-2-406(M), if not fully
14 complied with, have been discharged as a matter of law. See Restatement (Second) of
15 Contracts §§261, 265.

16 **C. Complainant's Unclean Hands Also Preclude the Relief Sought.**

17 Principles of equity likewise preclude the relief sought by Mr. Dains in the present
18 case. The doctrine of "unclean hands" prevents a party who has acted in bad faith from
19 seeking the assistance of a court or other governmental entity to reap the benefits of his or
20 her bad faith actions. Dawson v. McNaney, 71 Ariz. 79, 86, 223 P.2d 907, 911 (1950). In
21 other words, "[e]quity will not grant relief to one who has been wanting in good faith or
22 good conscience or in fair dealing." Hamblin v. Woolley, 64 Ariz. 152, 161, 167 P.2d 100,
23 105-06 (1946) (quotation and citation omitted).

24 Here, as detailed above, Mr. Dains had the ability to prevent the filing, review and
25 approval of the Agreement by the Commission. Mr. Dains did so. Mr. Dains' estate now
26

27 between Park Valley Water Company case and present situation).] Accordingly, that
28 decision has no bearing on the issues in this matter.

1 seeks, in bad faith, to profit from Mr. Dains misconduct by having the Agreement rescinded
2 and the full sum allegedly spent installing the water infrastructure for the Terra Ranchettes
3 estate immediately paid to Mr. Dains' estate. Given that Mr. Dains has already admittedly
4 recouped those funds through his sale of lots in the subdivision, [Trans. 31:25-34:10
5 (recouped, at a minimum, \$1.6 million from lot sales), 60:19-61:15 (sales prices anticipated
6 profitable sales and were set prior to refund agreement with Rigby)], and has accepted the
7 benefit of the Agreement for over ten years, [Pre-Filed Direct Testimony of F. Wilkinson at
8 9:13-13:16; Exs. RWC 9, 10], Mr. Dains' unclean hands should preclude him from
9 benefiting under the circumstances presented here.

10 **D. Mr. Dains' Complaint is Barred by the Statute of Limitations.**

11 Furthermore, Mr. Dains' Complaint, which purports to seek recovery pursuant to the
12 authority of A.R.S. § 40-248 is barred by the two-year statute of limitations found in that
13 statute. A.R.S. § 40-248 provides that "[a]ll complaints concerning excessive or
14 discriminatory charges shall be filed with the commission within two years from the time
15 the cause of action accrues ..." Here, the actions complained of in the Complaint began, at
16 the latest, upon the execution of the Agreement in March 1999, over ten years before the
17 filing of the present Complaint.

18 Mr. Dains was aware of the purported causes of action stated in the Complaint no
19 later than 2000, the year he first received a refund from Rigby. [Pre-Filed Direct Testimony
20 of F. Wilkinson at 9:13-15 (Rigby began providing refunds to Mr. Dains in 2000); Ex. RWC
21 9.] Mr. Dains, however, did not seek to enforce his purported rights for over six years,
22 despite having full knowledge of his potential causes of action. [Id.] Instead, Mr. Dains
23 (and his estate) continued to accept and cash the annual refund checks from Rigby. [Pre-
24 Filed Direct Testimony of F. Wilkinson at 9:13-13:16; Exs. RWC 9, RWC 10; Trans. 66:2-6
25 (Mr. Dains cashed annual refund checks prior to informal complaint).] Mr. Dains (and his
26 estate) continued to cash such checks even after Mr. Dains' informal complaint was closed
27 without action by the Commission. [Pre-Filed Direct Testimony of F. Wilkinson at 13:4-16
28 (Mr. Dains (and his estate) accepted and cashed annual refund checks between 2006 and

1 2009); Trans. 67:16-21 (post-2006 checks cashed by Mr. Dains).] There can be no question
2 that Mr. Dains' cause of action accrued, as a matter of law, no later than the filing of his
3 informal complaint in 2006. Nonetheless, it took Mr. Dains nearly three additional years to
4 seek formal relief, and then only in a transparent attempt to profit from the City's filed
5 condemnation action. Accordingly, the two year statute of limitations found in A.R.S. § 40-
6 248, the statute upon which Mr. Dains purports to base jurisdiction, bars this action.

7 **E. The Commission Lacks Jurisdiction Over Mr. Dains' Remaining Claims.**

8 Outside the purported, technical violation of A.A.C. R14-2-406(M) discussed above,
9 Mr. Dains' Complaint essentially seeks private contractual relief. Mr. Dains' estate has
10 focused on the City's potential acquisition of Rigby and any profits Rigby might make in
11 such an acquisition. Indeed, the Complaint contains a claim for "unjust enrichment," but
12 cites no statutory or other authority for the Commission's consideration of such a claim,
13 because there is none.

14 Mr. Dains' Complaint essentially seeks civil remedies available through the Superior
15 Court in this administrative tribunal. To the extent that Mr. Dains had any interest in the
16 constitutionally mandated and protected condemnation proceeds to be paid by the City to
17 Rigby, which he does not, Mr. Dains could have asserted that interest in the underlying
18 condemnation proceeding. Instead, Mr. Dains seeks to leverage the Commission's oversight
19 of Rigby into a cash payout in this docket and, now, in Docket No. W-01808A-10-0390.
20 Mr. Dains has cited no jurisdictional basis for the Commission to provide civil relief. Nor
21 can he. Absent such a basis, the remaining allegations of the Complaint should be
22 dismissed for lack of jurisdiction. See Southern Pac. Co. v. Arizona Corp. Comm'n,
23 98 Ariz. 339, 345, 404 P.2d 692, 696 (1965) (Commission's "authority must be found in
24 either the Constitution or in statutes enacted by the legislature" because it has no implied
25 powers); see also, e.g., Tonto Creek Estates Homeowners Assoc. v. Arizona Corp. Comm'n,
26 177 Ariz. 49, 57, 864 P.2d 1081, 1089 (App. 1993) ("A decision rendered by the
27 Commission which goes beyond its powers as prescribed by the constitution and statutes is
28 subject to attack for lack of jurisdiction).

F. A.A.C. R14-2-406 Does Not Apply to the Present Circumstances.

Finally, A.A.C. R14-2-406 (F), has no applicability to this Docket. A.A.C. R14-2-406 (F) provides that:

The Commission will not approve the transfer of any Certificate of Public Convenience and Necessity where the transferor has entered into a main extension agreement, unless it is demonstrated to the Commission that the transferor has agreed to satisfy the refund agreement, or that the transferee has assumed and has agreed to pay the transferor's obligations under such agreement.

Commission rule R14-2-406(F) is triggered by the transfer of a Certificate of Convenience and Necessity ("CC&N") from one private utility to another. There is no evidence in the record that such a transfer is contemplated or will occur. The City is a municipality authorized by law to provide utility service to its citizens without the need for a CC&N. A.R.S. § 9-511. In settling the City's condemnation suit, Rigby has agreed, even though Rigby believes the Commission's jurisdiction with respect to the resolution of a condemnation suit brought by a municipality is extremely limited under the statutory scheme, to seek deletion of its CC&N from the Commission. That deletion proceeding has been assigned Docket No. W-01808A-10-0390. Mr. Dains has intervened in that docket. In that proceeding, Rigby is not seeking a transfer of its CC&N to the City, but only the deletion of its CC&N. Accordingly, R14-2-406(F) has no applicability to either the deletion proceeding or this proceeding, and the Complaint's allegations in that regard must be dismissed for failure to state a claim upon which relief can be granted. Even if R14-2-406(F) somehow applied to the City's condemnation of Rigby, which it does not, the treatment of the Agreement is more properly addressed in the deletion proceeding, not this proceeding.

III. CONCLUSION

The Agreement has been filed with the Commission on several occasions. Further, Rigby has made numerous attempts to obtain the ATC from Mr. Dains in an effort to have the Agreement approved by the Commission. Until after the hearing in this matter, Mr.

1 Dains (and his estate) ignored Rigby's requests and unilaterally prevented Rigby from
2 obtaining Commission approval of the Agreement. Mr. Dains cannot be rewarded for his
3 own malfeasance. Accordingly, Rigby asks that the Commission enter an order denying any
4 relief to Mr. Dains and closing his Complaint without further action.

5
6 RESPECTFULLY SUBMITTED this 15th day of December, 2010.

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8
9
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